(17)

No. 95-813

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

BRAD BENNETT, *et al.*, *Petitioners,*

vs.

MARVIN PLENERT, *et al.*, *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals, Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE STATE OF TEXAS

The Attorney General of the *amicus curiae* State of Texas submits this brief, pursuant to Supreme Court Rule 37.4, on behalf of the State of Texas ("Texas"), and the private groups that have endorsed this brief,[1] to bring to the attention of the Court the adverse impact of the Ninth Circuit's decision in *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) ("*Plenert*") on

[1] The list of the twenty-one private groups that have endorsed this brief is included in the Appendix at 1a. Citations to the Appendix to this brief will be cited as: Texas App. at 1a.

the state's self-governing rights and powers. Texas also submits this brief in its capacity as *parens patriae* in order to ensure that the doors of the federal judiciary remain open to Texas citizens, when necessary, to protect their rights in property and interests in contracts.[2]

The Self-Governing Interests of the State of Texas Are Adversely Affected by the Ninth Circuit's Decision

The property rights of Texas citizens are defined, maintained, and protected by state laws, and rules, regulations, and ordinances promulgated pursuant to state law. This body of state law and the right to establish and set forth the preservation of private property under state law is protected from federal government intrusion by the Tenth Amendment,[3] the Guarantee Clause,[4] and the inherent structure of the United States Constitution.

The Property Interests of the State of Texas and Its Citizens are Threatened

The listing of a species as endangered and the concomitant designation of the critical habitat by a federal agency have a

[2] Throughout this brief, the plaintiffs below will be referred to as "plaintiff-petitioners" and the defendants below will be referred to as "defendant-respondents."

[3] U.S. CONST. amend. X ("Tenth Amendment"): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] U.S. CONST. art. IV, § 4 ("Guarantee Clause"): "The United States shall guarantee to every State in this Union a Republican Form of Government."

direct impact on the interests of private land owners in Texas.[5] Every time the United States Fish and Wildlife Service ("USFWS") lists and designates critical habitat under sections 3 and 4 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1532, 1533, it potentially affects a substantial portion of the land in Texas. This is so because of the USFWS' over-expansive interpretation and use of the ESA and because over ninety-eight percent of the land in Texas is private or state-owned land. The federal government's actual ownership interest in Texas land is negligible. Texas' experiences with the USFWS illustrate the magnitude of the problem.

Sixty-five species found in Texas have been listed as endangered or threatened under the ESA by the USFWS.[6] The sixty-five species listed are found in approximately 212 of Texas' 254 counties. *See* Bryan Arroyo, *Threatened and Endangered Species of Texas*, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, Aug. 1992.

[5] Indeed, Texas also has a direct interest in the outcome of this issue. Because Texas is a "person" within the meaning of § 3(B) of the Endangered Species Act, 16 U.S.C. § 1532(13), it is entitled to sue under the citizen suit provision. *See* 16 U.S.C. § 1531(c)(2), § 2(c)(2) of the ESA, which states that it is the "policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." The Ninth Circuit's decision not only violates the Congressional policy stated in § 2(c)(2), it directly limits Texas' ability to bring an action for violations of the ESA.

[6] Forty-six of these species are fish or wildlife. Included in the listing are the following: the golden-cheeked warbler (*Dendroica chrysoparia*), the Texas blind salamander (*Typhlomolge rathbuni*), Texas wild rice (*Zizania texana*), the fountain darter (*Etheostoma fonticola*), the Houston toad (*Bufo houstonensis*), the piping plover (*Charadrius melodus*).

Thus, every time the USFWS lists or designates critical habitat, it potentially affects some portion of ninety-eight percent of the land in 212 Texas counties, or approximately 255,506 square miles. *See* Texas App. 5a (showing the counties potentially affected should the USFWS designate critical habitats for all sixty-five listed endangered or threatened species in the state).

The listing of a species and the designation of a critical habitat by the USFWS resonates in every corner of Texas: it reduces the value of land and diminishes the ability of land owners to "capture" groundwater; it affects the use and productivity of land whose legal title is held by the State of Texas for the benefit of the school children supported by the Permanent School Fund; it diminishes the value and use of state parks, as when the Texas Parks and Wildlife Commission had to delay plans to expand a golf course at a state park because the expansion had to be evaluated and approved by the USFWS because of the "*possible*" presence of the Houston toad, (a species listed under the ESA as endangered); and, in a scenario reminiscent of the one in *Plenert*, it will affect the ability of the Canadian River Municipal Water Authority, a political subdivision of the State of Texas similar to the water districts in Oregon, to fulfill its duties and mission to facilitate the delivery of water to Texas Panhandle residents because of the listing of the Arkansas River shiner.

As if to add insult to injury, top federal administrators, some of whom are far removed from Texas, fail to grasp the import of their actions. For example, the Director of the USFWS has

said, while discussing a listed species, the golden-cheeked warbler, that "[t]he critical-habitat designation doesn't add anything to the constraints on the average landowner" implying that the mere listing of a species is sufficient to constrain the landowner. *See* "Agency defends plan for songbird habitat," *San Antonio Express News,* July 27, 1994. *See also* in the same article comment of Nancy Kaufman, Deputy Director of the USFWS, "[i]f a farmer is currently going out and destroying this [warbler] habitat, it is already a problem".

The USFWS is enforcing a regulatory regime under the ESA where it dictates to the State of Texas, the political subdivisions of the state, and private landowner-citizens what they can and cannot do with their property. Under *Plenert* this *de facto* regulatory scheme graphically illustrates why the Court must give property owners in every state the ability to sue to protect their interests in the courts of the United States.

The Property Interests of the Plaintiff-Petitioners are Left Unprotected

The plaintiff-petitioners, ranchers and water districts rely on water provided under federal contract,[7] by the Klamath Project, a federal reclamation project, for "*commercial purposes, as well as for their primary sources of irrigation water.*" *See* Appendix

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[7] In 1905 Oregon and California ceded title in the Lower Klamath and Tule lakes to the United States for project development under the Reclamation Act of 1902 to drain lakebed lands in order to store and provide water for irrigation and other purposes out of the sale of water rights to homesteaders on the reclaimed project lands. *See generally* 43 U.S.C. §§ 371, 485(f)-(h), & 511-13.

to Petition for Writ of Certiorari ("Cert. App.") 33-34, ¶ 5 (emphasis added). The plaintiff-petitioners, who were denied standing to challenge the federal government's decision to stop providing water for their needs -- individuals and state political subdivisions with vested and concrete economic interests, secured in part by contractual agreement with the federal government -- possess significant interests that provide the Court with a unique opportunity to clarify the law of standing to ensure that individuals, political subdivisions of the states, and states with concrete economic interests that are threatened by agency action will, at a minimum, have access to the courts of the United States to protect their interests.

Fundamental Protections of Private Property Are Abandoned by the Ninth Circuit

It is a bedrock principle of our jurisprudence that interests in property are determined in the courts according to the rule of law.

> *[T]he right of property*, . . . as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, *is regulated by civil institutions, and is always subject to the rules prescribed by positive law.*

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.) (emphasis added). The Ninth Circuit, in *Plenert*, silenced plaintiff-petitioners, ranchers and water districts, denying them the ability to protect their interests in property. If the Court lets

the result in *Plenert* stand, the Constitution's guarantee to protect, according to the rule of law, vested property rights and contract rights of its citizens in the courts of the United States is also silenced.

Texas writes because it is important that the law of standing include plaintiffs such as the plaintiff-petitioners, whose concrete economic interests meet constitutional and prudential standards. If these plaintiff-petitioners lack standing, as a practical matter the courts of the United States will be closed to most plaintiffs attempting to review agency action under the ESA or the Administrative Procedure Act.

SUMMARY OF ARGUMENT

This appeal presents the Court with two straightforward questions of standing under the ESA.[8] The Ninth Circuit's *Plenert* decision must be overruled because it unnecessarily restricts the reach of Article III of the United States Constitution,[9] it violates fundamental principles of federalism, it misreads the citizen suit provision of the ESA, it violates the principles of stare decisis by ignoring case precedence, and it misapplies the law of standing established by this Court. The

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[8] The first question is whether the broad grant of standing in the citizen suit provision of the ESA is subject to a zone of interests test. If the Court answers no, the inquiry ends. If the Court answers yes, the second question is whether plaintiff-petitioners -- public water suppliers and water users with economic interests -- fall within the zone of interests protected or regulated by the ESA.

[9] U.S. Const. art. III

Ninth Circuit's decision will leave landowners and political subdivisions of the states barred from the courtroom while federal agencies make policy decisions without supervision and regard to the rule of law.

ARGUMENT

I. Consequences of the Ninth Circuit's Opinion

A. The Ninth Circuit's Opinion Renders Hollow the Promise of Article III

The Ninth Circuit denied standing to plaintiffs who have meritorious causes of action to protect valuable property rights. These plaintiffs clearly have standing, under both an Article III analysis and an analysis under the prudential zone of interests test. The decision challenged here tramples the constitution's guarantee to citizens of a judicial forum for protection of their rights and interests in property and it permits unsupervised policy making, exempting a federal agency from meaningful judicial review.

Article III defines the limits of federal judicial power and determines who may come to the federal courts to seek judicial relief.

> [I]t is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476 (1982) ("*Valley Forge*"). *Valley Forge* recognizes that Article III guarantees to the states and its citizens access to the courts for redress of injuries to them, so long as they meet the minimum dictates of Article III. The Ninth Circuit's opinion breaks the promises embodied in Article III. *See Valley Forge*, 454 U.S. at 471-76 (discussing constitutional and prudential principles, all of which are embodied within the context of the guarantees of the constitution).

The Ninth Circuit's *Plenert* ruling allows federal environmental agencies to immunize themselves from suit so long as they characterize their actions as protecting endangered or threatened species. The Ninth Circuit achieved this immunization by making a value-laden decision, unauthorized by Article III or the ESA, that some plaintiffs are more deserving of federal judicial recourse than others. A district court from the Northern District of Alabama wisely refused to take the course taken by the Ninth Circuit, explaining:

> To limit standing to public interest groups who complain of the possible endangerment of a species, asserting an aesthetic, or moral, or a scientific, or a philosophical interest, is both unfair and one-sided, and invites disingenuous pleading by parties who have legitimate interests of whatever kind. *There is no reason for only one side of an issue to have access to*

> *a federal court.* Public and judicial scrutiny of the listing process of the *Endangered Species Act and its regulation is part of the legislative design to guarantee fair and full access by all persons and entities truly interested in the outcome including those whose interest is economic in whole or in part.*

Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service, No. 93-AR-2322-S, 1993 WL 646409 (N.D. Ala. Nov. 9, 1993), *aff'd*, 26 F.3d 1103 (11th Cir. 1994) (emphasis added).

The ESA, of course, speaks to species protection, but it also contains a broad citizen suit provision allowing a wide range of plaintiffs to sue the federal government. The views of the Ninth Circuit, advocated by defendant-respondents, restrict the ESA's citizen suit provision and reduce it to the propositions that only those asserting a supposedly pro-species position have standing, and that no one may sue to complain of an agency's actions as being too protective. These propositions, if accepted by the Court, would render meaningless the ESA citizen suit provision. *See infra* at 22, discussion of the Ninth Circuit's erroneous reading of 16 U.S.C. § 1540(g). *See, e.g., Mausolf v. Babbitt*, 913 F. Supp. 1334, 1342 & n.13 (D. Minn. 1996) ("*Mausolf*") (questioned about who could challenge a federal government action "overzealously" protecting an endangered species, the "[federal] defendants took the remarkable position that such an action would be immune from challenge, and entirely beyond review, because it benefits, rather than harms, endangered or threatened species"). These interpretations cannot be the law, at least under our constitutional system of governance.

The court in *Mausolf* held that "interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA" and stated that it was:

> unwilling to adopt the view that the FWS [United States Fish and Wildlife Service] is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue -- a concept for which no precedent has been advanced and which is foreign to the rule of law. It is instead, the Court's view that the FWS must operate within the parameters of the ESA.

913 F. Supp. at 1342.

The Constitution demands that litigants who meet standing requirements (constitutional and prudential) be heard. Congress in the ESA broadly encourages citizen participation in an unequivocal voice. The Ninth Circuit's decision, if allowed to stand, would render meaningless the dictates of Article III and the citizen suit provision of the ESA, allowing federal environmental regulatory agencies to escape judicial review. Put another way, the Ninth Circuit's view of judicial process would be akin to a baseball game in which only one team got to bat, while the other team was perpetually playing defense on the field -- assuming it were allowed to leave the dugout, or even enter the stadium in the first place.

B. The Ninth Circuit's Failure to Embrace Article III Disrupts the Proper Balance of State and Federal Powers and Damages the Self-Governing Rights of the States and Their Citizens

The Ninth Circuit's improper reading of Article III and the citizen suit provision of the ESA, denying the self-governing rights of the states and their citizens to protect vested economic interests, infringes upon additional constitutional safeguards.

1. The Constitution Protects the Self-Governing Rights of the States, Which Thereby Protect Private Property Rights

The proper balance between the federal government and the states in "our federalism" is textually preserved by the Tenth Amendment and the Guarantee Clause, and is embedded in the inherent structure of the Constitution.[10] *See Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting). Certain irreducible principles flowing from the Constitution protect the interests of the states and their citizens.

By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution established a framework in which the states

[10] The appropriate balance between the states and the federal government is further safeguarded by the Eleventh Amendment as well as by proper limitations on the powers of Congress under the Commerce Clause. *See United States v. Lopez*, 115 S.Ct. 1624 (1995). *See also Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996) (The Court reiterated that: "each State is a sovereign entity in our federal system"; the Eleventh Amendment limits federal courts' jurisdiction under Article III; and "(t)he [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.").

retained "substantial sovereign authority." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 (1982) ("*FERC*"). *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). If the states or the people have not conferred a power upon Congress, then *a fortiori* a federal agency cannot assume that power in derogation of the Tenth Amendment. *See New York v. United States*, 112 S.Ct. at 2417 (1992) ("*New York*") ("[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.").

The Guarantee Clause is predicated on the proposition that state governments are accountable to their citizens with respect to fundamental decisions about how to allocate, control, and use resources and define property rights. *FERC* at 761. A state's "republican form" of government is diminished when its ability to make decisions is fettered, constrained, or overridden by a federal agency voluntarily or otherwise acting *ultra vires*.[11] These inherent protections prevent an abuse of power by the federal government. *See New York*, 112 S.Ct. at 2431 (citations omitted) ("The Constitution does not protect the sovereignty of the States . . . as abstract political entities. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

[11] Of course, pursuant to the Supremacy Clause and assuming a basis for exercising a power (*e.g.*, the Commerce Clause or the Spending Clause), Congress can intrude into state sovereignty and override state law. The requirement, however, is that Congress must plainly state that it intends to override state law.

The Guarantee Clause, like the Tenth Amendment, protects states from an over-intrusive federal government ensuring that the states and the citizens of the states retain control over the essential elements of self-governance.[12]

Thus, the federal system of government created by the Constitution under the Guarantee Clause, the Tenth Amendment, and the Eleventh Amendment, established a national government operating in a mutual sphere of influence with state governments that act as independent political communities with the authority to make decisions of self-governance that "include the power to structure and organize the processes of government." La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 790-92 & nn. 31-33 (1982). *See Lane County v. Oregon*, 7 Wall. 71, 76 (1869). The right of states to control incidents of self-governance creates "a healthy balance of power between the states and the federal government [that] will reduce the risk of tyranny and abuse from either front." *New York*, 112 S.Ct. at 2431.

There is no incident of self-governance more fundamental to the processes of government than the system of laws that define

[12] The control of elected officials by the electorate and their accountability to the citizens who entrust them to office is the *sine qua non* of a republican form of government. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers [citing J. Locke, *Second Treatise of Government*, 149]." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) ("*Guarantee Clause and State Autonomy*"), citing The Federalist No. 39 (James Madison).

and protect the property of the citizens of the various states.[13] Indeed, under the police power reserved to the states, and protected by the Constitution, state and local governments are responsible and entitled to enact, maintain, and enforce zoning,[14] land use planning, and natural resource management laws to regulate and govern the use of land and water.

2. The USFWS Tramples the Private Property Rights of Texas Citizens

The USFWS has construed the listing and designation provisions of the ESA in an alarming manner. *See supra* at 2. Because of the over-expansive use of the listing and designation provisions, as well as other overly intrusive interpretations of the ESA, the State of Texas is concerned that USFWS has and

[13] "Property interests, of course, are not created by the Constitution, but rather 'by existing rules or understandings that stem from an independent source such as state law.' " *Delaware v. New York*, 113 S. Ct. 1550 (1993) (citations omitted). Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings & Loan Assoc.v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[14] "[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18 (1975) *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994) ("[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge."). The Court has recognized that the states' land use planning powers are formidable. *See California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419, 1431 (1987) ("[E]ven within the sphere of the Property Clause, state law is preempted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.' "). *See also Federal Urban Land Utilization Act*, 40 U.S.C. §§ 531, 533 and *Federal Land Policy and Management Act of 1976*, 43 U.S.C. §§ 1701, 1712(c)(9) where Congress has also directed federal agencies to cooperate with local land use planning and zoning measures that would not otherwise apply to federal property.

will contrive a *de facto* comprehensive resource management scheme in Texas that prevents landowners and the State of Texas from using their land, property, and resources in ordinary, customary ways (such as building homes and pumping groundwater) in accordance with state and local law. This resource management scheme violates basic tenets of federalism textually embodied in the United States Constitution, as well as deeply embedded in the federalism structure of the Constitution.

The USFWS' intrusion does not stop with the listing and designation provisions and procedures. In a series of letters to Central Texas landowners in thirty-three Texas counties, the USFWS sought to apply the "take" prohibition of section 9 of the ESA, 16 U.S.C. § 1538, to property recently under consideration for designation as critical habitat for the golden-cheeked warbler.[15] In one letter to a landowner engaged in clearing his property, the USFWS laid out its policy.

> This letter is in reference to recent clearing activity on your property. . . . This property supports vegetation that is *possibly* occupied by the federally listed endangered warbler.
>
> . . . .
>
> *If the activities taking place on the subject site disrupt the breeding and/or foraging activities of*

[15] The letters manifest USFWS' contention and policy that "takes" in violation of the ESA occur whenever a human activity modifying habitat "disrupt[s] the breeding and/or foraging activities" of a listed species. USFWS has taken this position regarding clearing of property throughout much of Central Texas, advising property owners that they may not clear or cut down certain trees without violating or risking violation of the ESA's prohibition against "taking" endangered species. The USFWS has not formally or officially rescinded any of its letters.

> *the . . . warbler, these activities would constitute a "take" of listed species . . . prohibited under section 9 of the Endangered Species Act (Act) and must be avoided.*

See Texas App. 6a for additional examples of these letters (emphasis added).

The individual impact of these letters is devastating. For example, Margaret Rodgers, who owns land in Travis County, has received letters from the USFWS informing her that clearing her land to build a fence may "take" an endangered species, the golden-cheeked warbler. The letters, which are obviously intended to operate *in terrorem*, stated that she could be subject to a fine of up to $50,000 and imprisonment up to one year. Understandably, she stopped trying to build the fence. The letters did not accuse her of killing or injuring a golden-cheeked warbler or allege that she proximately caused the death or injury of a golden-cheeked warbler (as would be required by the Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2407 (1995) ("*Sweet Home*")). In fact, they did not even say that any warblers live, or have ever been seen, on her property -- the mere clearing of her land was sufficient reason to prompt the USFWS to send its letters. Hundreds of other landowners in the Texas Hill Country are in Mrs. Rodgers' predicament.[16]

[16] Mrs. Rodgers at least knows that she risks civil and criminal penalties being imposed as a result of using her land. But an unknown number of other landowners and governmental entities in Texas are also subject to those penalties for making ordinary use of their land, but do not know it. Indeed, they are unable to know it, because USFWS does not make clear the extent of its regulatory program under section 9 of the ESA.

The State of Texas is additionally concerned that if the USFWS cannot directly use its continuing, over-expansive interpretation of "harm" pursuant to section 9 of the ESA to reach activity on private land (such as the pumping of groundwater or the clearing of cedar trees in which a protected bird *may* nest), it will illegitimately increase its efforts to control those activities indirectly through forced consultation procedures pursuant to section 7 of the ESA, 16 U.S.C. § 1536, with a federal agency having *some* federal program delivery nexus with the landowner. *See, e.g.*, J.B. Ruhl, *Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1109 (1995) (section 7 is the "sleeping giant" of the ESA programs and "section 7(a)(1)'s species conservation duty has the potential to eclipse all other ESA programs"). For example, in central Texas, the USFWS could pressure the Farmers Home Administration, utilizing the ESA's section 7 consultation process, to refrain from making or guaranteeing loans to farmers seeking financing for farming activities which depend on the pumping of aquifer water from the Edwards Aquifer.[17] In another setting, the Department of Air Force could be forced to consult with USFWS prior to any redevelopment of Kelly Air Force Base.

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[17] In July 1994, the USFWS convened a meeting of approximately 40 federal agencies to discuss the Edwards Aquifer issue and the duty of federal agencies to abide with its over-expansive interpretation of the ESA. *See Sierra Club v. Glickman*, MO-95-CV-091, (W.D. Tex. filed Apr. 28, 1995) (signaling that ESA litigation may switch to the ESA section 7 front).

3. The States and Their Citizens Must Be Able to Vindicate Their Self-Governing and Private Property Rights

Chief Justice Chase in *Texas v. White*, 7 Wall. 700 (1869), discussed the effects of the Ordinance of Secession on the existence of Texas as a member of the Union. In concluding that Texas did not cease to be a state, he recognized that the "preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." 7 Wall. at 725. The states must be able to access the federal court system not only in order to protect their self-governing powers, but also the self-governing and economic interests of their citizens.[18] If the Court does not allow the states and their citizens to protect their economic interests from rogue actions of federal agencies, the promise of the preservation of the states and their governments is broken.

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[18] The denial of the right to bring a suit to protect a property interest, whether that right was created by Congress as in the citizen suit provision of the ESA or exists independently, as in the plaintiff-petitioners' contract with the federal government, may itself be viewed as an injury. By closing the federal judiciary to the plaintiff-petitioners, the Ninth Circuit caused a deprivation of property. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (the denial of the right to bring a lawsuit may constitute a deprivation of property). It is the deprivation of a right to use property coupled with the ability to bring a legal action to enforce that right, that is the core and fundamental attribute of standing, in federal court. *Cf. Crowell v. Benson*, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting) ("Under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

II. The Analytical Shortcomings of the Ninth Circuit's Analysis

The Ninth Circuit, in concluding that plaintiff-petitioners did not have standing, employed a multi-step analysis. First, it held that Congress in enacting the citizen suit provision of the ESA did not expand standing to the full limits of Article III, thereby engrafting a zone of interests analysis onto the standing inquiry.[19] Second, the panel of the Ninth Circuit held that the plaintiff-petitioners did not fall within the zone of interests protected by the ESA.[20] At each analytical juncture, the Ninth Circuit took the wrong turn. It seriously misread the citizen suit provision of the ESA, failing to give the language its plain meaning. Using ordinary methods of statutory analysis suggests a very different conclusion than that reached by the Ninth Circuit. Additionally, in its analysis of the zone of interests test, the *Plenert* Court failed to give economic interests the significance that they have been

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[19] Relying on *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 410 (1987), the Ninth Circuit reasoned that "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." 63 F.3d at 919. Applying what it called its "consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions," it held that the ESA's citizen suit provision does not automatically confer standing "on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures." 63 F.3d at 919.

[20] Having determined that the zone of interests test should be applied, the Ninth Circuit asked whether the "ESA protects plaintiffs who assert an interest of the type asserted here." 63 F.3d at 919. Without much substantive adornment, the *Plenert* court simply answered "in the negative, holding that only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original).

accorded by other panels within the Ninth Circuit,[21] by other circuit courts,[22] and, most importantly, by this Court. Texas first addresses the misreading of the ESA's citizen suit provision.

A. The Ninth Circuit Misreads 16 U.S.C. § 1540(g)

"The starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). If the words of a statute in their ordinary and common usage "convey a definite meaning, which involves no absurdity, .

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[21] The Ninth Circuit applied the zone of interests test in a manner inconsistent with its own prior opinions. *See, e.g., Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (a county's proprietary interest in its lands adjacent to a designated critical habitat represented the necessary concrete interest under *Lujan* and fell within the zone of interests protected by the National Environmental Policy Act); *Pacific Northwest Generating Co-op v. Brown*, 25 F.3d 1443, 1450 (9th Cir. 1994) (plaintiffs with an economic interest [large direct purchasers of hydropower] have a footnote 7 procedural interest in ensuring that the ESA is followed); and *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1538-39 (9th Cir. 1993) (economic interests of water conservation district and four irrigation districts met Article III requirements and zone of interests test to challenge the final rule of the Environmental Protection Agency under the visibility provisions of the Clean Air Act).

[22] The Ninth Circuit also failed to follow the decisions from other circuits. *See, e.g., Catron County Bd. of Comm'rs, New Mexico v United States Fish & Wildlife Service*, 75 F.3d 1429, 1233-34 (10th Cir. 1996) (county's claimed injuries to its proprietary and procedural interests fall within the zone of interests protected by the ESA where the designation of a critical habitat would cause flood damage to county-owned property); and *State of Idaho, by and through Idaho Public Utilities Comm'n v. Interstate Commerce Comm'n*, 35 F.3d 585, 590-92 (D.C. Cir. 1994) (the specific authority to sue under 16 U.S.C. § 1540(g) coupled with Idaho's proprietary interest in state land surrounding Wallace Branch was sufficient to meet the prudential standing limitation under the ESA).

. . then that meaning . . . must be accepted" as the expression of Congress' legislative purpose. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 (1987) ("*Cardoza*") (legislative purpose is expressed by the ordinary meaning of the words used); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

In 16 U.S.C. § 1540(g), Congress created a unique three-part citizen suit provision that confers standing to the full extent of Article III.[23] Congress in § 1540(g)(1)(A) allowed "any person" to sue any governmental unit who might be in violation of any provision of the ESA or any regulation flowing from the ESA. Further, in § 1540(g)(1)(C) Congress allowed "any person" to sue the Secretary for failure "to perform any [nondiscretionary] act or duty under section 1533" of the ESA.

The plain meaning of "any" is "any and all"; "any" should be given its natural broad meaning. *See United States v. Geyler*, 932 F.2d 1330, 1333-34 (9th Cir. 1991). Additionally, reference to the lexicon, in the historical and cultural context of the language, is another way to establish plain meaning. *See, e.g.*, R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 231 (1975). The lexicon, through the repeated use of "any person," "any

[23] Congress under 16 U.S.C. § 1540(g)(1)(B) granted "any person" the authority to file a civil action to compel the Secretary to apply the ESA prohibitions against taking of resident endangered (or threatened) species. Although the taking language is not relevant at this time, this subpart shows that Congress intended to open the courts to as large a group of plaintiffs as possible.

provision of the ESA or any regulation," and "any act or duty" in subsections (B) and (C), evinces Congress' desire to open standing under the ESA's citizen suit provision to the limits of Article III. The language of 16 U.S.C. § 1540(g) "admits of no exception" -- all persons who meet the requirements for standing under Article III, whether on purely aesthetic, recreational, professional, or economic grounds, must be heard. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) ("*TVA*") (The Court in an ESA case stated: "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.").

Finally, any question about the plain meaning of statutory language is conclusively settled where Congress knowingly borrows language that carries an established interpretation. *See Rodriguez v. United States*, 107 S.Ct. 1391, 1393 (1987) ("*Rodriguez*") ("[I]n passing the Comprehensive Crime Control Act of 1984, Congress acted -- as it is presumed to act -- with full awareness of the well established judicial interpretation.") (citations omitted). In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) ("*Gladstone*"), the Court held that Congress had granted standing "as broad as permitted by Article III" in the Fair Housing Act of 1968 when it authorized "any person aggrieved" to file a civil action. Congress' use of "any," with the understanding that the word is equated with the broadest grant of standing under Article III, see *Gladstone, supra*, directly supports the position that the plain meaning of the language in 16 U.S.C. § 1540(g) grants full Article III standing. Indeed, Congress knows exactly how to enact a narrower citizen suit provision in environmental legislation.

See 33 U.S.C. § 1365 (limiting an action by a citizen against a governmental entity "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation").

Once the plain meaning of the statutory language settles the question of legislative intent, legislative history is reviewed "to determine only whether there is 'clearly' expressed legislative intention contrary to that language which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *Cardoza, supra*, 107 S.Ct. at 1213 n.12. The plain-meaning presumption is so strong that "going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). Nothing in the legislative history of the ESA overcomes the plain language presumption. When the plain statutory language settles a question of statutory construction, "any further steps take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke*, 471 U.S. 84, 96 (1985). The defendant-respondents' limited view of the citizen suit provision is unpersuasive. *See Rodriguez*, 107 S.Ct. at 1393 (omissions and brackets by the Court) ("Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in the formulation of the statute.").

As the Court noted in *TVA*:

> [c]itizen involvement was encouraged by the Act, with provisions allowing interested persons to . . . bring civil suits in United States district courts to force compliance with any provision of the Act, §§ 1540(c) and (g).

437 U.S. at 181 (citations omitted). The Court did not qualify "citizen." The Ninth Circuit erred when it did.[24] Congress in 16 U.S.C. § 1540(g) generally, and in 16 U.S.C. § 1540(g)(1)(C) in particular,[25] ensured that plaintiffs who meet Article III standing requirements must have their day in court.

B. The Ninth Circuit Failed to Acknowledge the Significance Given by the Court to Economic Interests in Standing Doctrine

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[24] The Court's use of "interested person" embraces Congress' broad grant of enforcement authority to any person who meets Article III requirements.

[25] The defendant-respondents improperly minimize the significance of 16 U.S.C. § 1540(g)(1)(C). *See* Brief for the Respondents in Opposition at 11-12 & n.6. Many of the agency actions that led to the filing of this lawsuit were arguably based on section 1533. The ESA process begins with the listing of a species as either threatened or endangered under 16 U.S.C. § 1533 (a). Species listings are based solely upon the best available scientific and commercial data pertaining to the species in question under 16 U.S.C. § 1533 (b)(1)(A). The Secretary must consider five factors in listing a species. *See* 16 U.S.C. § 1533 (a)(1). The ESA was amended in 1978 to require the Secretary to consider factors other than solely biological factors in designating critical habitat. *See* Pub.L. No. 95-632, 92 Stat. 3571 (1978); H.R.Rep. No. 95-1625, S. Rep. No. 95-874, H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. (1978). For example: the Secretary must identify the areas that meet the scientific definition of critical habitat in 16 U.S.C. § 1532 (5)(A); and he is to consider the "economic impact and any other relevant impact of specifying any particular area as critical habitat," *see* 16 U.S.C. § 1533 (b)(2).

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), the Court announced a prudential standing requirement in addition to the Article III standing requirements, for determining whether a plaintiff had standing under the Administrative Procedure Act. The test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Id.* at 153.

In *Data Processing*, the Court, treading cautiously, emphasized that an interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154. *Data Processing* appeared to presume that plaintiffs asserting economic concerns would meet the zone of interests test. *See* 397 U.S. at 154 ("We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury in which petitioners rely here."). The Court concluded that "[c]ertainly he who is 'likely to be financially' injured . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case." 397 U.S. at 154.

The Court in *Data Processing* recognized the significance of economic values because the linchpin in many standing inquiries, either under Article III or a prudential consideration, is whether the plaintiff alleges a property-based legal interest for which a cause of action lies. *See, e.g.*, Cass R. Sunstein, ***What's Standing After Lujan? of Citizen Suits, "Injuries," and Article III***, 91 Mich. L.R. 163, 189, 192 & n.132 (1992) ("The loss of money is a real and tangible harm; the offense produced by objectionable government policy may be intense, but it is merely [an] offense.") ("Sunstein").

The significance of an economic injury is no less important, with regard to the ultimate inquiries into standing, because of the nature of the lawsuit. *See* Sunstein at 191 ("When Congress creates a cause of action enabling people to complain against racial discrimination, consumer fraud, or destruction of environmental assets, it is really giving people a kind of property right in a certain state of affairs. Invasion of that property right is the relevant injury."). The Court recognized the importance of an economic interest when it held that California, as a participant and beneficiary in federal OCS leasing off the California coast, had standing to challenge the adequacy of the bidding process of the Secretary of the Interior. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981) ("Watt") (California's direct financial stake in federal OCS leasing off the California coast coupled with its interest in seeing that the Secretary of the Interior used the most successful bidding system on all OCS lease tracts gave it standing to challenge the Secretary's refusal to experiment with non-cash-bonus bidding systems.).

The Court has acknowledged that an injury to a "procedural right" to protect concrete interests may support standing under the citizen suit provision of the ESA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Lujan*") ("There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for

redressability and immediacy.").[26] *Cf.* Sunstein at 226 in footnote seven (a procedural right is created "because it structures incentives and creates pressures that Congress has deemed important to effective regulation").

Recently, the Court spoke of the interests cognizable under the ESA.

> In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, *the [ESA] encompasses a vast range of economic and social enterprises and endeavors.* These questions must be addressed in the usual course of the law, through case-by-case "resolution adjudication."

Sweet Home, 115 S.Ct. at 2418 (emphasis added).

The concrete property and economic interests of the plaintiff-petitioners, which have been infringed by the actions of the defendant-respondents, are sufficient to support standing under the citizen suit provision of the ESA, regardless of whether the analysis is subjected to the bare Article III requirements or the zone of interests test.

CONCLUSION

This case is about fair access to the courts of the United States. The Ninth Circuit erred when it straight-jacketed the citizen suit provision of the ESA by applying the zone of interests test. A

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[26] The Court's phraseology, "a procedural right to protect [a] concrete interest," refers to a due process right to a judicial determination of an economic interest so that a deprivation of property does not occur. *See supra* at 9.

plaintiff, to have standing under the citizen suit provision, must meet the case and controversy requirements of Article III, nothing more. The plaintiff-petitioners have the most cognizable types of interests, concrete property and contract rights, that litigants need to have standing. They certainly meet the requirements of Article III or even the prudential zone of interests test. Accordingly, for the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

JAVIER P. GUAJARDO*
Special Assistant Attorney General
*Counsel of Record

SAM GOODHOPE
Special Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191

May 24, 1996 COUNSEL FOR AMICUS CURIAE

APPENDICES

PRIVATE GROUPS ENDORSING THIS BRIEF

Associated Milk Producers, Inc.

The Association is the nation's largest dairy farmer cooperative. Its members produce twelve percent of the nation's milk supply.

Blackland Cotton & Grain Producers Association

The Association is composed of approximately five thousand cotton and grain producers all interested in the protection of the rights of landowners.

Exotic Wildlife Association

Organization of breeders, owners, ranchers and managers of exotic hoofstock species and alternative livestock interested in conservation, propagation and preservation of exotic species on private land.

Independent Cattlemen's Association of Texas, Inc.

The Association represents approximately 6,000 cattlemen/ranchers throughout the State. Their mission is to be the premier representative of the cattle industry, provide an effective legislative voice for all its members, and have the vision to accept and promote changes which impact their well being.

Riverside and Landowners Protection Coalition

The Coalition is a non-profit corporation whose members own and operate rural land throughout Texas. The group is committed to educating the general public on private property issues and working state and federal agencies to preserve the privacy attached to ownership of private property.

Southern Rolling Plains Cotton Growers Association, Inc.

The Association represents 1,500 various cotton producers dedicated to enhance the standard of living for cotton farmers

through promotion of cotton, participation in research and technology to improve cotton yield and economy of production.

Southwest Association

A regional association which represents various hardware retail stores and farm equipment retail dealers throughout Texas, Oklahoma, Louisiana and New Mexico.

Southwest Meat Association

The Association is an organization representing the meat industry throughout a five state area. Members are mostly small to medium size packers and processors and associated supply companies.

Take Back Texas

A non-profit organization comprised of landowners located primarily in the Texas Hill Country area, seeking to educate the landowning community regarding governmental actions that may affect their property and their property rights.

Texas Ag Industries Association

The Association is a non-profit entity representing the plant food and crop protection industries in Texas.

Texas Agri-Women

The association is a non-profit, non-partisan organization primarily composed of farm and ranch women, agri-business women and consumers working together to develop and promote agriculture.

Texas Association of Agricultural Consultants

TAAC serves as the offical organization for private, independent agricultural advisors in Texas. With 61 members, the Association

serves around 1000 farmers and ranchers by recommending production practices that will least adversely affect the environment.

Texas Association of Nurserymen

The organization is a trade association representing the wholesale production, retail garden center, landscape professional and allied supplier segments of the nursery industry in Texas.

Texas Cotton Ginners' Association

A non-profit trade association, consisting of 85% of the gins in the State, that represents cotton ginners on issues impacting the cotton ginning industry of the State.

Texas Cotton Producers, Inc.

A non-profit trade association comprised of the nine regional cotton producing organizations in the State. Acts as a forum for the regional organizations to collectively address issues impacting the Texas Cotton industry.

Texas Farm Bureau

The Bureau is a private non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas, with 302,352 current members and affiliated county Farm Bureaus in 211 Texas counties.

Texas Food Processors Association

The organization is a non-profit trade association representing companies engaged in the processing of food products in Texas. It is dedicated to support, promote, and encourage education in all aspects of the food industry in Texas.

Texas Grain Sorghum Association

A voluntary membership organization working on legislative and regulatory issues that affect Texas grain sorghum producers.

Texas Justice Foundation

The organization is a non-profit litigation foundation which supports the principles of free markets, limited government, private property and parental rights as the fundamental structure of a free society.

Texas Seed Trade Association

An organization formed as an effective voice of action in all matters concerning the development, marketing and free movement of seed, associated products and services throughout Texas, the United States and around the world.

Texas Wildlife Association

The Association in a non-profit entity which serves as an advocate for the rights of wildlife, wildlife managers, landowners, and hunters. It is dedicated to the maintenance, management, and enhancement of wildlife habitat on private land.

Texas Counties Potentially Impacted By Critical Habitat Designation

UNITED STATES
DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

February 20, 1991

Mr. & Mrs. Mike Igua
P.O. Box 4748
Lago Vista, TX 78645

Dear Mr. & Mrs. Igua:

It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more that $50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to $25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnston of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,

Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot in Jester Point, Phase I, or 7101 Foxtree Cove,
Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10 (a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 24, 1993

Phil Frazier
Horizon Enviornmental Services, Inc.
P.O. Box 162017
Austin, Texas 78746

Dear Mr. Frazier:

This responds to your letter, dated May 24, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endagered species:

O.321 acres located on Lakeview Drive in Comanche Trail Subdivision, Travis County, Texas.

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would not provide suitable habitat for the black-capped vireo and the cave invertebrates, but would provide suitable habitat for the golden-cheeked warbler.

Our records indicate that golden-cheeked warblers have been observed on the periphery of this property. Current biological information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity

in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

December 3, 1993

Keith E. Young
KEY Group Engineering
3701 Bee Caves Road, Suite 102
Austin, Texas 78746

Dear Mr. Young:

This responds to your letter, dated August 31, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

Part of 25.4 area tract located 4.1 miles from 1431
off Lime Creek Road, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would provide suitable habitat for the golden-cheeked warbler, the black-capped vireo and/or the cave invertebrates.

The subject tract is part of a large tract occupied by golden-cheeked warbler, black-capped vireo and/or the cave invertebrates. Additionally, areas that are biologically necessary for the continued existence of a

species may not be continuously occupied by that species. Current biologicial information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This repsonse is intended to assist you in such compliance. You are ultimately repsonsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Patrick Noack
2000 Yaupon Valley Road
Austin, Texas 78746

Dear Mr. Noack:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 23-acre tract located off Yaupon Valley Road in Westlake Hills, Travis County, Texas. Information received from the Travis County Tax Appraisal District indictates that you are the owner of this property.

The Fish and Wildlife Service (Service) has reviewed this property for endangered species concerns in a letter, dated June 10, 1992, (see enclosed copy). In this letter, based on biological surveys provided by Horizon Environmental Services and other information available at that time, our agency advised that development of this tract would require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). Further development of this property would be prohibited under section 9 of the Act. We are providing information on this section 10(a)(1)(B) permitting process for your information.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

The Service recommends no further development activities occur on this lot and that all construction and vegetation clearing stop immediately. Failure to stop these activities immediately could result in a violation of the Act and possible criminal or civil actions that could result in fines and/or imprisonment.

Should you have any questions regarding the determination on this property, or would like to have a meeting concerning this property and the section 10(a)(1)(B) permitting proccess, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Jerri Garner
25613 River Fern Court
Leander, Texas 78641

Dear Ms. Garner:

This letter is in reference to recent clearing activities on the property across River Fern Court from your horse stable operations near Leander, in Williamson County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are very likely present on your property close to the area that has been cleared.

If the activities taking place on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Harm" in this

definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Incidental taking," authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the appropriate enclosures for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, of the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Jana Grote
/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

cc: Jean Nance

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Austin Americana Enterprises
Rex Bohls
1301 S IH-35
Austin, Texas 78741

Dear Mr. Bohls:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 473 acre tract of land known as the Friendship Ranch in Hays County, Texas. Information received from the Hays County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service reviewed this property in a letter to the Doug Hodge Company on October 16, 1991, for endangered species concerns (see enclosure). In that letter we stated that, based on aerial photographs and other data available to this office, the property could provide suitable habitat for the federally listed and protected golden-cheeked warbler (*Denroica chrysoparia*). We also included information regarding minimal survey (warblers) using the property.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary

for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

We have not received any information, since that correspondence, to change our determination that the subject property could provide suitable habitat for the warbler. If there are warblers present on this property, development could require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). We are providing information on the section 10(a)(1)(B) permitting process for your consideration and urge you to contact this office for further assistance on how to comply with the Act.

Should you have any questions regarding this property, or would like to schedule a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

Enclosure

cc: Alex Hasychak, FWS, Special Agent, Law Enforcement

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 25, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your fax, dated September 17, 1993, requesting that this office evaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Two tracts on River Hills Road off FM 2244 (Bee Caves Road), Austin, Travis County, Texas

We have reviewed the information on the 1991 and 1993 surveys you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but could provide suitable habitat for the golden-cheeked warbler.

Because of sightings on or adjacent to these tracts, we believe that clearing or development related activities on this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take"

of a federally listed species unless the "take" is incidental to an otherwise lawful activity and section 7 or section 10(a)(1)(B) permit under the Act has been obtained. Therefore, development of this acreage would require authorization under the Act.

Thank you for providing pertinent information regarding this evaluation. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 14, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter dated March 4, 1994, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

Painted Bunting Subdivision, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. Based on current biological information, we do not believe that this property would provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

Your bird survey indicates that two golden-cheeked warblers were observed in the canyon. Current information indicates the warbler is

sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on Lots 6-13, would constitute a "take" as defined by the Endangered Species Act. The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and section 10(a)(1)(B) permit under the Act has been obtained. Therefore, construction of residences on these lots would require authorization under the Act.

However, construction on Lots 1-4 and 14-15 (drawing enclosed) would not require authorization under the Act if the following conservation measures are incorporated in the construction.

1. Remove only those trees and shrubs necessary for construction of driveway, septic tank and house.

2. Confine the development activities on the front 200 feet of the lot.

3. Use only native plant species for landscaping.

4. Confine exterior construction activities so that it occurs outside the breeding season for the golden-cheeked warbler (breeding period is from March 1 through August 1), so as to avoid disruption of breeding behavior.

We believe that destruction of the habitat located beyond the front 200 feet of the lot could result in a "take" of the endangered golden-cheeked warbler and thus, require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Act. This response is intended to assist you in such compliance. However, you are ultimately responsible for compliance with all laws, and this letter cannot assure you complete protection from any future liability or exempt you from any current or future federal, state,

regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 23, 1994

Fran & Larry Collmann
9911 Anderson Mill Road
Austin, Texas 78750

Dear Mr. & Mrs. Collmann:

This responds to your letter, dated September 19, 1994, requesting this office re-evaluate the 13.942 acres located near Spicewood Springs Road and Loop 360 off White Cliff Dr., Austin, Travis County, Texas property. We have re-evaluated the new information you provided.

As stated in our letter June 1, 1994, our records indicate that golden-cheeked warblers have been sighted on the western, southern and eastern boundaries of this property. Mr. Lee Sherrod's letter to you of June 13, 1994, indicated the possibility of black-capped vireos in the area. Current information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on the majority of this tract, could constitute a "take" as defined by the Endangered Species Act. The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development.

However, we also said, there may be a possibility of building a single house on the 13.942 acres without constituting "take" if the following conditions are observed. We wish to reiterate that this property is very close to habitat that is occupied by the golden-cheeked warbler and/or black-capped vireo. To avoid harassment (a possible "take" violation) of the species that may occur in the area, we wish to recommend the following conservation measures:

1. Construction of only one single family home on the northeast portion of the property, the area which is already cleared.

2. The driveway be constructed in the already cleared roadway.

3. Exterior construction activities on this property not occur between March 1 and August 1.

4. Remove only the trees that are needed for construction of the house and septic field.

5. Use only native plants and grasses for landscaping.

6. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

7. Prohibit the use of pesticides, herbicides and fertilizers.

If these conservation recommendations are not followed, then we believe a take could occur and recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act. Section 10(a)(1)(B) permit procedures are enclosed.

Thank you for providing pertinent information to help re-evaluate this property. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote
Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Glenn Williams and Terry Wynn, Partners
P.O. Box 64138
Lubbock, Texas 79464

Gentlemen:

This letter is in reference to recent vegetation clearing activities on 611.208 acres of your property located near Spanish Pass Road and Tower Road in Kendall County, Texas. This property supports vegetation that is likely to be occupied by the federally listed endangered golden-cheeked and/or black-capped vireo.

If the development activities on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler and/or black-capped vireo, these activities could constitute a "take" of listed species.

The Endangered Species Act (Act) prohibits the "take" of federally-listed species unless the "take" is incidental to otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. "Take" is defined as harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

We recommend that clearing activities on the property be discontinued and you contact Alma Barrera for additional information on compliance of such activities with the Act at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

cc: Regional Director, Region 2
Solicitor, Department of the Interior, Tulsa, OK
Fish and Wildlife Service, Law Enforcement, San Antonio, TX

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 9, 1994

Stan & Donna Buck
305 Golden Oaks Drive
Georgetown, Texas 78628

Dear Mr. & Mrs. Buck:

This responds to your letter, dated March 23, 1994, requesting this office to review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot 8, Lake Georgetown Estates II, located on County Road 262, Georgetown, Williamson County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

The subject lot is part of a block of habitat occupied by the golden-cheeked warbler. Areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current

biological information indicate the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities in this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development. Procedures for the section 10(a)(1)(B) permit process are enclosed.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 22, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter, dated June 28, 1994, regarding the re-evaluation of the HE Brodie tract, located Barton Creek Loop 360, Lamar and Ben White Blvd., Austin, Travis County, Texas.

Our records indicate that golden-cheeked warblers have been observed along the Barton Creek greenbelt adjacent to this property and some observations along the property line. The subject tract is part of a large tract occupied by golden-cheeked warblers. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological information indicates the warbler is sensitive to several factors associated with development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors.

We believe that clearing or development-related activities on part of this property (the water quality buffer and transition zones), could constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act.

As discussed during our meeting of July 12, we believe some development can occur outside the City of Austin water quality buffer and transition zones, 800 feet from the middle of Barton Creek, without constituting "take" if the following conditions are observed.

1. Exterior construction activities within 1000 feet from the middle of the creek not occur between March 1 and August 1.

2. Remove only trees that are needed for construction.

3. Use only native plants and grasses for landscaping.

4. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

If these conservation recommendations are not followed, then we believe a take could likely occur and we recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act.

We appreciate your concern for endangered species and your desire to comply with the Act. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote
Field Supervisor

Enclosure

cc: City of Austin, Environmental & Conservation Services Dept.
City of Austin, Power & Light
Jim Nuckles, Travis County Tax Appraisal District